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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

1553

JOY M. CHANDLER CARPENTER, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Joy M. Chandler Carpenter, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a Judgment of the conviction of the United States District Court for the Western District of Texas, Pecos Division.

OPINIONS BELOW

The District Court Judgment of Conviction (Appendix A) was filed on March 27, 1970. The Court of Appeals opinion (Appendix B) was filed on February 8, 1971.

Petition for rehearing was denied on March 10, 1971 (Appendix C).

JURISDICTION

The Judgment of the Court below was entered on March 27, 1970 (Appendix B) and the order denying rehearing was filed on February 8, 1971 (Appendix C). The jurisdiction of the Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in the admission of the testimony of the witnesses Edna Clayton, Earnest T. Hopper, Loretta Brookfield, Keith McDaniels, Richard C. Elmore, James S. Nance, R. A. Crowder and John M. Wood?
2. Whether the District Court erred in the admission of the details of the pending charges against defense witness Henson?
3. Whether the District Court erred in allowing, over objection, the summarization by the prosecution's chief investigator of the testimony of numerous witnesses, and did this summarization constitute an invasion of the province of the jury?
4. Whether the District Court erred in allowing the opinion of the questioned document expert to be admitted into evidence in absence of a proper predicate for the control document?
5. Whether the District Court erred in allowing the United States Attorney to make assertions of personal knowledge of facts not in evidence, and to misstate the record?

STATEMENT OF THE CASE

Petitioner was indicted by a Federal Grand Jury on August 18, 1969, in cause No. P-69-CR-101; said indictment charged Petitioner with violations of Sections 7201, and 7206 (1) of Title 26, United States Code; Petitioner was also indicted by a Federal Grand Jury on October 6, 1969, in cause No. P-69-CR-123 charging the Petitioner with perjury in violation of Title 18, United States Code Section 1621.

The two indictments were joined by the trial court on motion by the prosecution on December 31, 1969, pursuant to Rule 13, F.R.C.P., Title 18, U.S.C.A.

Petitioner was charged with four counts of perjury before a Federal Grand Jury in cause No. P-69-CR-123. These charges centered on the identity of a party who allegedly accompanied Petitioner to a Bank in Dallas, Texas, to present a check in the amount of ONE HUNDRED EIGHTEEN THOUSAND DOLLARS ($118,000.00), payable to one Victor Brookfield; the identity of the person which accompanied Petitioner to the offices of H. L. Merrit, to notorize a mineral deed; the identity of a man who registered at the Westerner Motel in Dallas, Texas, on February 3, 1964, while Petitioner was a guest therein; and whether Petitioner had made a trip to Ojinaga, Mexico in 1964, in the company of one Patricio Gomez.

These charges were under Section 1621, Title 18, United States Code Annotated.

Petitioner was tried simultaneously on all six counts; found guilty by the jury and sentenced to serve ten (10) years from which sentence she timely appealed.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW BEFORE THE COURT

The Appellant, Joy M. Chandler Carpenter, negotiated a mineral lease for Victor Brookfield in the amount of ONE HUNDRED EIGHTEEN THOUSAND DOLLARS ($118,000.00), by dealing with a man named Jack Russell who was an agent for an oil man, W. W. Meeker (App. 15).

Appellant met Victor Brookfield in Dallas, Texas and went to the office of a C.P.A. to have the mineral deed executed and notarized (App. 287-293), and then carried the deed and a draft to the Wynnwood Bank in Dallas, Texas; as a part of the transaction a partnership agreement was drawn up and executed between Appellant and Victor Brookfield (App. 590). When the papers were executed Appellant and Victor Brookfield went to the bank and placed the draft in the amount of ONE HUNDRED EIGHTEEN THOUSAND DOLLARS ($118,000.00), for collection (App. 56). The Appellant and Brookfield made arrangements to open several accounts, received signature cards and left the bank (App. 63). When the money was credited to Brookfield, several accounts were opened in the Wynnwood State Bank by the Appellant at Brookfield's request (App. 61-83).

Appellant met Brookfield on a number of occasions to deliver monies to him at his request, which had been withdrawn from the accounts at the Wynnwood State Bank, Dallas, Texas (App. 617-619). These monies were delivered to Brookfield who was in hiding from his mother, who had tried to have him committed in a lunacy proceeding shortly before this time (App. 569). Additional monies were withdrawn and delivered to

Brookfield at his request including the trip to Houston, Texas, to deliver a part of his monies (App. 633-634).

As a result of the trips to Dallas, Texas to consummate the deal with Brookfield, and the trips to Odessa and Houston numerous persons were called as witnesses who saw, talked to, and attempted to identify Brookfield as James W. Henson for the Government.

The Government called a number of witnesses from Dallas, Texas who were employees of the Wynnwood Bank (App. 55), and the office of the C.P.A. (App. 292), to testify to the transactions and to identify the man with Appellant as her brother-in-law rather than Victor Brookfield. The identity issue was further pursued by the Government in calling a number of law enforcement witnesses to testify to a search for Brookfield and the resultant inability to locate him (App. 163, 91, 131, 133).

A number of letters were introduced into evidence as alleged known samples of the handwriting of Victor Brookfield (App. 189, 209), and compared by a document examiner to attempt to show that the signatures on the checks, deed, etc. were not the signature of Victor Brookfield. (App. 188-189)

During the trial the Internal Revenue Agent prepared and presented a summary and used the testimony of the witnesses who he had listened to during the trial as part of his summation (App. 384, L. 1-14).

The defense presented rebuttal testimony that James W. Henson was not with the Appellant in Dallas at the lawyers office, the C.P.A.'s office or at the Wynnwood State Bank (App. 740-752), but was attending a social

at his home in Marynoll, Texas, when the Appellant was in Dallas (App. 466-467; 484, 564, 740-752), and was driving a truck during the time he was alleged to be in Houston, Texas.

James W. Henson was indicted and charged in a case still pending, with perjury concerning his denial that he accompanied Appellant to Dallas, and that he was not at the Westerner Motel when Appellant stopped there (App. 752-753).

There was no evidence from any witness from the State of Texas explaining why the charge of forgery against Appellant growing out of this transaction, was never brought to trial, nor was there any judicial notice of the laws of forgery of the State of Texas brought before the jury.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The opinions below raise constitutional, procedural, and substantive questions relating to due process, and proper.

Issue I. The hearsay testimony of the witnesses Clayton, Hopper, Brookfield, McDaniels, Elmore, Nance, Crowder, and Wood was admitted over defense objection.

The first category of inadmissable hearsay involved the government's attempt to establish the "negative" or "non-existence" of the person known as Victor E. Brookfield to convey the impression of his having been disposed of by or on behalf of the Petitioner.

Extent of the hearsay testimony was not restricted or limited in any way; it was so extreme that the testimony of a deceased witness was actually presented by the wit-

ness Hopper (Sheriff) who testified to the conversation with the mother of Victor Brookfield, who had died prior to trial.

Attention is directed to the testimony of the witness Crowder (R. 89) and the objection (R. 91) thereto by the defense.

This entire line of inquiry went beyond the scope of relevancy allowed in *Keith v. United States,* 250 F.2d 355 (5th Cir.).

Search activities covering time periods long after the event are not valid use of the "proof of a negative" exception to the hearsay rule.

There is evidence in the record that Brookfield's mother tried to have him committed as insane. He successfully defeated this and obviously had no great love for, and in fact, had fear of his mother. His disappearance to avoid his mother's attempt to commit him was a logical inference from the testimony of the Government's witnesses.

The testimony of the Rangers was on a search after the facts, and had no materiality on the acts that occurred giving rise to the indictment. The prejudicial nature of this testimony, the inflammatory effect on the trial jury cannot be minimized.

The natural inference contemplated by the evidentiary tender was that the Defendant had caused the disappearance of Brookfield, when in truth and fact, Brookfield had just as valid a cause for leaving the State because of his mother's attempts to put him in an insane asylum as did the Appellant for desiring his absence.

This entire line of questioning to these Ranger witnesses extend the negative proof exception beyond the

limits contemplated and has done irreparable harm to the Defendant.

The second category concerned conversation between ex-sheriff Hopper and the now deceased Mrs. Brookfield; these conversations were not the result of a search or the product of an investigative inquiry.

There was no predicate of relevancy in this instance to constitute a waiver of the hearsay prohibition. *Huff v. United States,* 301 F.2d 760 (5 cir.). The nature of the conversations concerning the absent Victor Brookfield and the "alleged" letters was highly prejudicial and inflamed the trial jury; they also provided "predicate" documents for handwriting analysis.

One additional witness whose testimony was total hearsay and highly inflammatory to the Petitioner, was the witness Edna Clayton that as county clerk she sat in a court hearing at which Victor Brookfield was a witness on his own behalf, and that he testified (in her presence) that two letters (Exhibits 27-A, 27-B), that were shown to him were mailed by him (App. 136, L. 13 L. 25).

The repeated questioning by the prosecution concerning Government's Exhibit 27-A and 27-B, that Brookfield "testified in Court that he had sent the letters to these individuals", (App. 140, L. 7-22) and the Court's refusal to stop such testimony was error of the most substantive nature, since these letters show up as the predicate upon which the handwriting expert renders his opinions concerning the alleged tracings. Nothing could be more damaging than these hearsay tenders.

No exception to the Hearsay Rule was cited by the prosecution with the tender, nor did the Court restrict

the hearsay. This is not the type error contemplated by Rule 52(a), Federal Rules of Criminal Procedure Title 18, U.S.C.A.

American courts have adhered rigidly to the rule that hearsay evidence is incompetent and inadmissible, unless it falls within one of the recognized exceptions. Hearsay evidence is excluded by rules pertaining to competency rather than relevancy.

Rules of hearsay were developed for the purpose of safeguarding the jury trial. *United States v. Bianco,* 189 F.2d 716 (C.A. 3rd). The inherent weakness of hearsay is not cured by the fact that a statement was made under oath in a judicial proceeding between parties other than the Appellant, such as in this case. *Delaney v. Cones,* 19 N.E.2d 850, 215 Ind. 355.

The witness, Clayton's testimony about "hearing Brookfield testify" that he had mailed these two critical letters is a classic example of hearsay. The witness had no personal knowledge of the fact, but only what she was told or heard by or from others. She was acting not on her own knowledge but simply as a conduit to relay the alleged testimony of Brookfield, to the trial of the Defendant without the defense having an opportunity to test its truthfulness.

The testimony of witness Clayton does not meet the test for an exception under the "verbal act doctrine" wherein certain statements are allowed for the limited purpose of showing mental condition or intent. This evidentiary tender and admission constituted substantive error.

D. The testimony of the witnesses McDaniels and Elmore who were the owner and employee at the motel

where Defendant was guest, concerning a conversation between Elmore and McDaniels relating to the Defendant was admitted over objection.

It is not an exception to the hearsay rule, there was no materiality or relevancy involved. The testimony was not admissible for any legitimate purpose, nor under any recognized exception.

Issue 2. In this issue the Court allowed the prosecution, on cross-examination of the witness Henson, to develop in full the fact that the witness is charged with a crime growing out of these facts; the court further allowed the government to go into the details of the charges as a vehicle to impeach Henson. This was over defense objection (R. 752, L. 3 to L. 25).

Credibility may be impeached by proof that the general reputation for truth and veracity is bad. *Creekmore v. Crossno, 259 F.2d 697*; the general rule that credibility can be attacked only be elicting evidence of conviction of a felony or a crime involving moral turpitude has been generally recognized by the courts. *Daniels v. United States,* 268 F.2d 849; *Watson v. United States,* 234 F.2d 42; *Steele v. United States,* 243 F.2d 721, cert. den. 78 S.Ct. 39, 355 U.S. 828, 2 L.Ed.2d 41, reh. den. 78 S.Ct. 115, 355 U.S. 875, 2 L.Ed.2d 79.

It is also established that the general rule that when a witness is cross-examined for the purpose of discrediting his veracity by proof of specific acts of misconduct not the subject of a conviction, the examiner must take his answer as it is given, and is not free to bring in independent proof to show that the answer was untrue. McCormick, S. 42 at N. 21, Wigmore S.S. 977, 979.

Accusation of misconduct, act of arrest, or of indictment is quite consistent with innocence. To admit this type testimony would involve a violation of the Hearsay Rule and the rule forbidding extrinsic testimony of misconduct.

In *United States v. Sweeney,* 262 F.2d 272, the court stated that if the testimony of other offenses does no more than show propensity to commit a given crime it is error to admit it. See also: *United States v. Stirone,* 262 F.2d 57, in accord.

It should be understood by all courts that the only relevant circumstance is the actual conduct, i.e., the fact, not the mere charge of having misbehaved which may or may not be true.

If it is improper to prove this by intrinsic testimony on the stand, it is doubly improper to attempt to prove it by hearsay, and trebly improper when accompanied by a prohibition of any rebuttal of the hearsay testimony by the witness or on his behalf. Wigmore on Evidence, Vol. III, S. 949-967.

The questions confronting the Court is whether the Court's denial of defense objection to the questioning of defense witness Henson was proper; in addition, was there an abuse of the restricted limitation on the exception to the prohibition concerning evidence of alleged "charges" and not "facts" of proof of criminality.

The expansion of the inquiry on cross-examination went to each detail of the charges pending, but unproved, against the witness Henson and was totally improper.

The prosecution not only developed the fact of the relationship of the parties, but proceeded to question the wit-

ness Henson about what he was charged with, though not yet tried, on each count in his indictment.

This circuit has long recognized that there is a limitation on questions directed toward an attack on the credibility of a witness by the use of the introduction of evidence of a prior conviction of the grade of felony or a crime involving moral turpitude. See: *Daniel v. U. S.*, 268 F.2d 849 (C.C.A. 5th) (1959); *Robertson v. United States* (C.C.A. 5th), 249 F.2d 737; *Steele v. United States*, Supra; and *Mathhews v. United States* (C.C.A. 5th), 145 F.2d 823.

This entire line of inquiry was improper and contravenes the very intent of the due process prohibition.

Issue 3. The Court allowed a witness investigator to testify and summarize the testimony of other witnesses who testified during the trial. This included the summarization agent witness, Harold Hughes of the Internal Revenue Service, who prepared certain printed charts, and summaries based on the facts and records allegedly acquired during the course of the investigation of the Defendant on tax matters involved in this cause.

The Agent witness was asked if he had prepared a summary and he replied he had. He was questioned concerning the content of his summary which was admitted into evidence without objection. Defense counsel throughout the trial exhibited a marked unfamiliarity with the exclusionary objections, the predicates required in certain evidentiary tenders and the basic evidence rules which he should have asserted in the Defendant's behalf throughout the trial.

Nowhere is this more graphically obvious than the failure to object to the expert exceeding the bounds of

his expertise and commencing a fact argument of the testimony of the various witnesses to lend weight and credibility to his testimony. The Court dignified this improper argument by refusing to instruct the jury to disregard the argument. (App. 389, L. 1-14)

The summarizing agent took note of and commented on the testimony he had heard in Court on Government witnesses Edna Clayton (App. 385), Jack Russell (App. 386), Richard Elmore (App. 387), Keith McDaniels (App. 387), Mary Cohill (App. 387), Shirley Thomas (App. 387), Pat Rutherford (App. 387), Roberta Langley (App. 387), Bob Crowder (App. 388), Pete Gomez, Ramon Lujon, and Mike Gomez (App. 388), Vein Knickerbocker (App. 388), Irby Todd (App. 389).

Summaries of entries in books and record made and kept in the regular course of business are admissible in evidence to aid the jury when prepared by a person shown to be competent to summarizing such information. It has also been held that summaries supported by primary evidence are likewise admitted, *United States v. Johnson,* 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1942); *United States v. Augustine,* 189 F.2d 587 (3rd Cir. 1951); *Papadohis v. United States,* 208 F.2d 945 (9th Cir. 1953); *United States v. Bernard,* 287 F.2d 715 (7th Cir. 1961); and *United States v. Willis,* 322 F.2d 548 (3rd Cir. 1963).

Where the summary is in the nature of secondary evidence and is not derived from other competent supporting proofs in the case, admission thereof may, in particular circumstances, constitute prejudicial error. *United States v. Ward,* 169 F.2d 460 (3rd Cir. 1948); *United States v. Mitchener,* 152 F.2d 880 (3rd Cir. 1945).

In the *Ward,* Supra, the Court stated:

> "While it can scarcely be gainsaid that voluminous records may be summarized, or that an expert may interpret and explain certain evidence in the case, and on the basis of such evidence perform tasks beyond the training and experience of the layman jurors, it is nevertheless axiomatic that the 'expert' may not go so far as to usurp the exclusive function of the jury to weigh the evidence and to determine credibility."

Nor may expertness be the medium for injecting into the record material and information not a part of the expert's qualifications and otherwise inadmissible through his lips. *United States v. Mitchener,* 152 F.2d 880 (3rd Cir. 1945).

The admission into evidence of the auditors conclusions and opinion as distinguished from mere statements of fact sumarizing what was observed by them in the records was erroneous.

It was aggravation of the error for Johnson (agent) to base his determination of the value of evidence in the case upon information which had been collected, and which could have been directly submitted to the jury for its appraisal. *Mitchener,* Supra, *Cooper v. United States,* 9 F.2d 216 (8th Cir., 1925); *Continental Casualty Co. v. First National Bank,* 116 F.2d 885 (5th Cir., 1941).

Obviously the summary chart of the monies, the bank drafts, deposits, and withdrawals and other documentary evidence was a proper subject for summary by Agent Hughes who is presumed to be an expert, although his qualifications were never challenged. These records are primary evidence and usually admitted as here.

In this case Agent Hughes with the knowledge and approval of the prosecutor had previously compelled written summaries for use during the trial; that they both contemplated a summary which not only included primary evidence, but included as an integral part, the tie together vehicle, i.e., the agent's opinion as to how the testimony of each witness, based on what Hughes recalled, had testified concerning certain transactions and documents and how they fit into his summary.

The testimony injected into, and used to explain, expand, and lend weight to the prepared summary constituted not primary evidence (facts, documents, etc.) but in its most naked sense, pure opinion and conclusionary observation of the agents recollection.

He is not qualified to argue facts, draw legal inferences, or conclusions, nor to attempt to lend with his testimony weight by stepping into, invading as it were, the sole and exclusive province of the trier of the facts, by summarizing testimony which is for the jury alone.

Issue 4.

During closing argument, the United States attorney, in his candor to rebut the defense attack on the credibility of his witnesses, made several material and significant departures from the record which constituted improper argument.

The most damaging and significant remark was the prosecutor's attempt to rebut the testimony of the Defendant that she was charged but never prosecuted for forgery by the State officials and was not guilty of it.

Since the prosecution went into this charge to attack the Defendant's credibility and got an answer it did not

desire, and then in spite of the prohibition that restricts attempting to rebut the answer given, the prosecutor sought to strike his blow in the closing argument. This can best be characterized by Professor Wigmore when he stated, "it is improper to prove this by extrinsic testimony on the stand, it is doubly improper to attempt to prove it by hearsay, and trebly improper when accompanied by a prohibition of any rebuttal of the hearsay testimony by the witness or on his behalf." Wigmore on Evidence, Vol. III. Sections 949-967.

The prosecutor's statement about the forgery charge against the Defendant was, . . . 'Mr. Johnson has made the statement that Mrs. Chandler was not prosecuted for forgery. But he did not tell you that they cannot prosecute for forgery in Texas under the Texas law. He did not tell you Mr. Brookfield was not around to testify that that was not his signature as is required in Texas. He didn't bother to tell you that."

The prejudice of this argument is quite obvious; from it the jury had before it the testimony, in argument form that they could logically assume was proper, that the Defendant would have been prosecuted *except* for the fact that Brookfield was not around to testify and that she was responsible for his disappearance.

In addition to the misstatement of the Texas law, as well as the record, the Government's prosecutor, in rebutting a defense attack on the credibility of one of his chief witnesses, volunteered the following remarks:

> ". . . Mr. Johnson suggested that Verta Langley, the person who identified Mr. Henson at Mr. Merritt's office, was mentally ill. 'Well I can tell you for a fact that she was ill when she was testifying. She

> had a registered nurse with her and she was under a doctor's care that very day, but she wasn't mentally ill.' "

He again volunteered personal testimony when he told the jury,

> ". . . I wish you folks could know the trouble we had in finding Ramon Lujon."

In *Hanford v. United States,* cited at 249 F.2d 295 the Fifth Circuit observed that, . . . "It is fair to say that the average juror in a greater or lesser degree, has confidence that these obligations, (to refrain from improper methods) which so plainly rest upon the prosecuting attorney, will be faithfully observed."

In both *Hanford,* Supra, and in *Berger v. United States,* 295 U.S. 78; 55 S.Ct. 629 (1935), the courts recognized that improper suggestions, insinuations, and especially, *assertions of personal knowledge,* are apt to carry such weight against the accused when in fact they ought to carry none."

In this case zeal outran fairness; the effect of the prosecutor's injection of his "personal knowledge" was a tacit admission that the prosecutor considered a key portion of his proof needed bolstering. This he remedied by his departure from the record to assist the testimony of his witnesses.

Had this been the only objectionable deviation from permissive evidentiary tenders then the Court could well dispose of the matter by the failure of defense counsel to interpose an objection. This type error is substantive and does not fall under the Harmless Error Rule. 52(a)

Fed. Rules of Criminal Procedure Title 18, United States Code Annotated.

The cumulative effect of the actions of the prosecution in repeatedly leading the Government's witnesses, with the Court's acquiescence, and repeatedly introducing testimony of a hearsay nature by numerous witnesses, by repeated use of improper opinion or conclusion questions, as well as the uniformity of the answers relating to identification, all constitute a pattern which was successfully consummated when the Defendant was convicted.

It is true that by Section 269, of the Judicial Code, as amended, 28 U.S.C. Section 391, not every technical error, defect, or exception which does not affect the substantial rights of the party is grounds for reversal, and if upon examination of the entire record substantial prejudice does not appear, the error, if it exists, must be regarded as harmless. *Rich v. United States,* 271 F. 566 (8th Cir.).

This cannot be said to be the case as will be presented to the Court in the summation of the points of error.

Issue 5.

The document examiner Todd, called by the Government to examine certain documents to make comparisons with the known handwriting of Victor Brookfield and the questioned documents later introduced in evidence in this cause, was given Government Exhibits 28, 29-B, 3-B, and 29, and told they were the known samples of Victor Brookfield's handwriting.

The admitted or proved handwriting of any person shall be admissible for purposes of comparison, to determine genuineness of other handwriting attributed to such

person 28 U.S.C. Section 1731, U.S.C.A. In *Miller v. United States,* 410 F.2d 1290 (8th Cir., 1969), the court allowed the signature of the Defendant to be used as a sample where there was ample evidence connecting the exhibits with the Defendant.

The so called "known handwriting samples or standards" or exemplars submitted were admitted without hesitation by the trial court as "known" and "identified" handwriting of Victor Brookfield.

These exemplars provide the basis or the indispensable predicate upon which each and every expert opinion rendered by examiner Todd must rely for such opinion to be valid and admissible.

The so called "known or predicate" exemplars of the handwriting of Victor Brookfield included Government's Exhibit Nos. 28, 29, 29-B, 29-C and 3-B. In the prosecutor's qualification of the witness Todd, he advised Todd in the question that these were the "known" exemplars (App. 187, L. 23-25), (App. 188, L. 10-13), (App. 188, L. 1-6), (App. 195, L. 25), (App. 196, L. 1-2), (App. 199, L. 22-25).

Todd qualified each opinion by relating that he examined the known "exemplars" and then made a detailed comparison between the known samplers and the questioned documents. (App. 209, L. 4-7)

Todd testified he first examined the writing of Victor Brookfield, and qualified his testimony with the phrase, ". . . at least what had been identified as the writing of Mr. Brookfield" (App. 189, L. 17-19) then examines the "identified" exemplars to use as a predicate for each subsequent opinion on the questioned documents. These in-

cluded Government Exhibits 3, 8, 5, 12, and 17, which were all in his expert opinion, described by Todd as not being written by the person who wrote the "Known" exemplars.

The question clearly before this Court is whether the initial admissibility of the "known" or "assumed to be known" exemplars consisting of Government Exhibits 3-B, 29, 29-B, 28, 29-C (App. 187, L. 23-25), (App. 188, L. 1-6), was proper.

Taking the two letters used as a substantial part of the predicate exemplars upon which examiner Todd relied to form his opinion, the Court's attention is directed to the testimony of the prosecution's witness, Edna Clayton, whose testimony "qualified" these letters as evidence to be used in this trial.

Edna Clayton testified she was in court and heard, during a lunacy hearing on Victor Brookfield, the same Victor Brookfield testify that he had sent the two letters to E. Kanne Oil and to Mr. Combs on July 20, 1963, and September 3, 1961, respectively.

Immediate objection was interposed by defense counsel to restrict this hearsay testimony and reject these letters as not properly tendered for admission. The Court allowed the testimony and accepted these two critical letters into evidence.

Government's Exhibit B was likewise admitted by testimony of witness Hopper who alleges he got it from the now deceased mother of Victor Brookfield. There was no testimony by anyone that it was a known sample of Victor Brookfield's handwriting.

Excluding the letters, the document examiner would have had two signatures alone, to go on, hardly enough to predicate the sweeping opinions which he gave which were so damaging to the defense and allowing his opinion to be opened to greater attacks.

None of these documents met the test of the documents in *United States v. Luiguou,* 373 F.2d 304 (2nd Cir., 1969), where full registration forms on a college application for admission were used as exemplars, the court let them in evidence because the signature and the forms were filled in with the same ink, and further, a witness had identified the writing as being "similar to" the handwriting of the Defendant. *Dean v. United States,* 246 F.2d 568 (5th Cir., 1917), in accord.

For the several reasons set forth herein, Petitioner requests that a writ of certiorari issue.

Respectfully submitted,

EDDINGTON & FRILOUX
1215 First National Life Building
Houston, Texas 77002
227-4141

By: _____
C. ANTHONY FRILOUX, JR.
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that copies of the application above, have according to the rules of this court been served on the opposing counsel, by placing said copies there, in the United States mails addressed to the United States Department of Justice, Tax Division, Washington, D. C. 20530, attention Messrs. Johnnie M. Walters, Assistant Attorney General, Joseph M. Howard, Richard B. Buhrman, and Willard C. McBride, attorneys; said copies were delivered to the United States Postal Service on this _____ day of _____, 1971.

_____

C. ANTHONY FRILOUX, JR.

APPENDIX A

JUDGMENT AND COMMITMENT IN CAUSE P-69-CR-101

On this 27th day of March, 1970, came the attorney for the government and the defendant appeared in person and by William P. Fonville and Hart Johnson, counsel.

It is adjudged that the defendant upon her plea of not guilty and a verdict of guilty has been convicted of the offense of having knowingly and wilfully subscribed to a false United States Individual Income Tax Return Form 1040 for the calendar year 1964, and which Return she did not believe to be true and correct as to every material matter, in violation of Section 7206(1), Title 26, U. S. Code; and of the offense of having knowingly and wilfully attempted to evade and defeat a large part of the income tax due and owing by her to the United States of America for the calendar year 1964 by preparing and mailing a false and fraudulent income tax return for the calendar year 1964, in violation of Section 7201, Title 26, U. S. Code, as charged in Counts 1 and 2 of the Indictment respectively, and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS pursuant to the provisions of Section 4208(a)

(2), Title 18, United States Code, on Count One above, and THREE (3) YEARS pursuant to the provisions of Section 4208(a)(2), Title 18, United States Code, on Count Two herein, said sentence to run concurrently with sentence imposed on Count One.

It is adjudged that the defendant pay to the United States of America the costs of this prosecution, including an Attorney's docket fee.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ERNEST GUINN
United States District Judge

JUDGMENT AND COMMITMENT IN CAUSE
P-69-CR-123

On this 27th day of March, 1970, came the attorney for government and the defendant appeared in person and by William P. Fonville and Hart Johnson counsel.

It is adjudged that the defendant upon her plea of not guilty and a verdict of guilty has been convicted of the offense of having willfully and contrary to oath stated material matter which she did not believe to be true before a duly empanelled grand jury and did thereby impede the grand jury in performing an expeditious inquiry, in violation of Section 1621, Title 18, United States Code, as charged in Counts 1, 2, 3 and 4 of the Indict-

ment, and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS pursuant to the provisions of Section 4208(a)(2), Title 18, United States Code, on Count One, said sentence to run consecutively to sentence imposed in No. P-69-CR-101 herein; FIVE (5) YEARS pursuant to the provisions of Section 4208(a)(2), Title 18, United States Code, EACH on Counts Two, Three and Four, EACH OF said sentences to run concurrently with sentence imposed on Count One above.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ERNEST GUINN
United States District Judge

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29,927
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOY M. CHANDLER CARPENTER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

(February 8, 1971)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM: Appellant was indicted on August 18, 1969, for knowingly filing a false income tax return and for wilfully attempting to evade payment of

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

taxes in violation of 26 U.S.C.A. §§ 7201, 7206 (1). On October 6, 1969, appellant was additionally indicted for committing perjury before a federal grand jury in violation of 18 U.S.C.A. § 1621. The indictments were subsequently consolidated, and appellant was tried before a jury. Upon a verdict of guilty on all charges, appellant was sentenced to a total term of ten years, from which conviction she now appeals.

Appellant lodges a broadside attack against the fairness of her trial. Specifically, appellant argues that there was error in (1) the admission of certain hearsay statements by Government witnesses, (2) the admission of the details of a perjury indictment pending against one of appellant's witnesses, (3) the admission of a summary of evidence by the Government's expert accounting witness, (4) the statements of the prosecutor in his summation to the jury, and (5) the admission of the testimony of the Government's handwriting expert, whose opinion, appellant alleges, was based on "known handwriting exemplars" for which a proper qualifying predicate had not been established.

We have carefully examined each of appellant's allegations of error and find them all without merit. The judgment of conviction is therefore.

AFFIRMED.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29,927
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOY M. CHANDLER CARPENTER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

(March 10, 1971)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG, and DYER,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1553

JOY M. CHANDLER CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 26–27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1971 (Pet. 26) and a petition for rehearing was denied on March 10, 1971 (Pet. 28). The petition for a writ of certiorari was filed on April 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction should be reversed because of alleged hearsay testimony received from certain government witnesses.

2. Whether the trial court erred in admitting, with regard to bias of a defense witness, the details of the charges pending in an indictment against that witness.

3. Whether the trial court erred in admitting a summary by the government's expert accounting witness.

4. Whether the prosecutor's summation created reversible error.

5. Whether the five handwriting examples used by the government's handwriting expert were properly authenticated.

STATEMENT

After a jury trial, petitioner was convicted on four counts charging perjury, on one count charging a willful attempt to evade her 1964 income tax in violation of Section 7201 of the Internal Revenue Code of 1954, and on one count of falsely making and subscribing her 1964 income tax return in violation of Section 7206(1) of the Code. The indictment alleged that petitioner's return reported her taxable income as $6,756.66 whereas the true amount was $58,756.66. Petitioner was sentenced to serve a total of ten years in prison.

The evidence to support the verdict may be summarized as follows:

In 1963 and 1964, petitioner was employed at the Pecos Abstract Office in Pecos, Texas. In September 1963, an employee of one Meeker advised petitioner that he had learned of some unleased land which belonged to Victor E. Brookfield. Meeker's employee advised petitioner that Meeker would pay her a commission if she could assist in acquiring for Meeker an oil and gas lease from Brookfield. Petitioner stated

that she would do so, adding that some people were of the opinion that Brookfield was of unsound mind. (R. 13–15, 18). Later, petitioner advised Meeker's employee that Brookfield was interested but that he would not sign the lease in front of a group of people (R. 21, 25).

Petitioner stated that the parties agreed upon a price of $118,000 and that she accompanied a man to the office of a notary public to sign the mineral deed. There was testimony that the man accompanying petitioner was not Brookfield but petitioner's brother-in-law, J. Walter Henson. (R. 287–291.) A handwriting expert testified that the signature "V. E. Brookfield" on the mineral deed (Govt. Ex. 2) was not in the handwriting of Brookfield (R. 189, 191–195) but had been traced from the signature on Government Exhibit 28, a letter written earlier by Brookfield and admitted in evidence at a hearing on his sanity in 1963 (R. 134–136).

As consideration for this mineral deed, Meeker issued a check dated February 3, 1964, payable to Brookfield in the amount of $118,000 (R. 26). Meeker's employee gave this check to petitioner on the afternoon of February 2, 1964 (R. 26). The endorsement of the name "V.E. Brookfield" on the check (Govt. Ex. 3) was a forgery, according to the government's expert, and had also been traced from the signature of Brookfield on Government Exhibit 28 (R. 202). Petitioner had testified before the grand jury that she saw Brookfield endorse the $118,000 check (R. 53) and that she saw him sign the mineral deed (R. 285–286), and these two statements were the basis of the first two perjury counts.

On or about February 3, 1964, Victor E. Brookfield disappeared and has never been found, despite a search for him by the Texas Rangers (R. 49, 92–93, 131–133, 164–165). No one except petitioner claims to have seen him since February 3, 1964.

Petitioner came into the Wynnewood State Bank in Dallas with a man on February 3, 1964, and told a bank employee named Mary Cahill that they wanted to open an account with a check for $118,000 (Govt. Ex. 3; R. 56–57). Petitioner did all the talking, and the man, whom she represented to be Victor E. Brookfield, was silent (R. 59–60). Mrs. Cahill gave them signature cards to sign for two accounts entitled "Brook-Chan Properties" and "V. E. Brookfield". Petitioner signed her cards but stated that "Brookfield" would sign his at a later date, explaining that "Brookfield" was very timid (R. 59–62). Signature cards returned by mail at a later date and purportedly signed by Brookfield were forgeries (R. 197). The man who accompanied petitioner to the bank was not Brookfield but J. Walter Henson (R. 73–75, 272–277, 309–313).

On February 4, 1964, an agent of Meeker gave petitioner a cashier's check in exchange for the original $118,000 check purportedly bearing V. E. Brookfield's endorsement (R. 63–64). A deposit of $50,000 was made in the account known as Brook-Chan Properties and one for $68,000 was made in the checking account in the name of V. E. Brookfield (R. 65). The Brook-Chan account could be drawn against either by petitioner or by Brookfield (R. 6, 61–62, 65–66).

After a long series of complex transactions involving these two bank accounts and other accounts opened at later dates, $52,000 of the funds were in petitioner's hands; $20,000 stemmed from the $50,000 in the Brook-Chan Properties account (R. 389) and the remaining $32,000 stemmed from the $68,000 originally deposited into the V. E. Brookfield account (R. 67–70, 384–385, 389–390). None of this money, which she received in 1964, was reported on her income tax return and the additional tax attributable to this $52,000 was $12,130.31 (R. 390).

Petitioner, testifying at the trial, claimed that she had turned the entire $52,000 over to Brookfield (R. 631–642). However, petitioner is the only person who even claims to have seen Brookfield after February 3, 1964, and she had no receipts or other documents to support her testimony. In a subsequent lawsuit against petitioner by the mother of Victor E. Brookfield, the amount of $43,000 was found and recovered from petitioner (R. 352–353).

The last two counts of the perjury indictment, of which petitioner also was found guilty, alleged that petitioner lied before the grand jury (before which she had appeared at her own request) when she testified (1) that her brother-in-law, J. Walter Henson, was not at the Westerner Motel in Dallas on the night of February 2, 1964; and (2) that she did not go to Ojinaga, Mexico, with Pete Gomez in February, 1964. The issues raised in the petition do not require elaboration of the evidence which supports the guilty verdict on these two counts.

ARGUMENT

1. There is no substance in the argument (Pet. 6–10) that the conviction should be reversed because of the introduction of hearsay evidence.

(a) Ex-Sheriff Hopper testified without objection that Brookfield's mother, since deceased, had contacted him early in 1964 "and at that time she did talk about Victor being gone" (R. 168). Petitioner's decision to withhold any hearsay objection precludes her present complaint. *Diaz* v. *United States,* 223 U.S. 442, 450.

(b) Witness Elmore testified without objection that on the night of February 2, 1964, he was night clerk at the Westerner Motel in Dallas and that he registered petitioner and J. Walter Henson (as "Hicks") in separate rooms during that night, and that after Henson registered he made a phone call through the switchboard to petitioner in another room (R. 98–101, 103). Petitioner points to no hearsay testimony from Elmore, but the motel manager, McDaniels, testified, again without objection, that on February 3, 1964, he was told by Elmore of the phone call from Henson to petitioner (R. 116–119). The insignificant nature of this corroborative testimony and the lack of objection preclude petitioner's present complaint.

(c) Witnesses Nance, Crowder and Wood were Texas Rangers who testified to their fruitless search for Brookfield in 1964 (R. 92–93, 131–133, 164–165). The disappearance was indisputably established by other evidence; in addition, Brookfield's absence was a negative fact essential for the government to prove,

and was properly proven by such evidence as this. II Wigmore, *Evidence* (3d ed.) Sec. 664.

(d) The testimony of Loving County (Texas) Court clerk Edna Clayton was pertinent only to the issue of foundation proof for handwriting exemplars, and is discussed in that context *infra.*

2. The trial court did not err in admitting, on the issue of Henson's bias as a defense witness, cross-examination as to charges pending against him in a perjury indictment (see Pet. 10-12). Henson testified at the instant trial that he was not in Dallas on February 3, 1964, when the mineral deed was notarized and the $118,000 check was presented to the bank in Dallas (R. 747) and further that he did not register as a guest at the Westerner Motel in Dallas on February 2–3, 1964 (R. 748). On cross-examination the government was permitted to show, on the issue of the interest and bias of the witness (R. 752, 808), that he was under indictment for perjury with respect to these same three matters (R. 752–753). The judge made it clear on two occasions that "the indictment doesn't mean [he] is guilty" and that evidence of it was admitted solely to show the interest Henson had in his own testimony (R. 752, 808). This ruling was plainly correct. Evidence of pending charges against a witness is admissible where, as here, it is allowed only for the limited purpose of showing bias, prejudice and motive of a witness. *Luna* v. *Beto,* 395 F. 2d 35, 38 (C.A. 5), certiorari denied, 394 U.S. 966; *Terminal Transport Co.* v. *Foster,* 164 F. 2d 248, 249 (C.A. 5).

3. Petitioner contends (Pet. 12–15) that the trial court erred in admitting an accounting summary by the government's expert witness. All of the evidence complained of was admitted without objection (R. 372–389). It was only at the end of the expert's testimony on direct examination that defense counsel interrupted and asked that the jury be specially instructed as to use of the summary (R. 389). The court later did so (R. 801). The jury could not possibly have been misled into the notion that it must accept the expert's conclusions from the evidence, *i.e.*, that the $52,000 represented income to petitioner. See *United States* v. *Johnson*, 319 U.S. 503, 519–520. Moreover, it was undisputed that the $52,000 had been traced into petitioner's hands; she admitted on the witness stand that she had received it (R. 631–642). The only issue was whether she had turned it over to Brookfield as she claimed (*id.*).

4. There was no objection to the prosecutor's summation at the trial, and this alone is fatal to petitioner's objection on appeal. *United States* v. *Kravitz*, 281 F. 2d 581, 586–587 (C.A. 3). Moreover, petitioner's counsel opened the door to the statements now complained of by improper arguments to the jury that a prosecution witness was mentally ill (Summations, p. 42), and that the state's failure to prosecute petitioner under state law for forgery proved that "the State of Texas does not believe that the Defendant in this case forged the name of V. E. Brookfield to that check" (Summations, p. 35). *Lawn* v. *United States*, 355 U.S. 339, 359–360, fn. 15.

5. There is no merit in the contention (Pet. 18–21) that the trial court erred in admitting the testimony of the government's handwriting expert because the examples written in the known handwriting of Brookfield were not properly authenticated. The expert testified (R. 189–202) that the signatures of Brookfield, on the mineral deed and on the $118,000 check, had been traced from the signature "V. E. Brookfield" on Government Exhibit 28, which was a letter produced from the Loving County (Texas) County Court file (R. 134) of an insanity proceeding in which Brookfield had successfully defended himself in 1963 against a petition by his mother (R. 16, 135) for the appointment of a permanent guardian. The Loving County Court clerk, who testified (R. 136) that in 1963 she heard Brookfield's testimony identifying Ex. 28 as his letter, also testified (R. 137–139) that on January 14, 1964, petitioner purchased copies of documents from the file in those proceedings which bore Brookfield's signature and that petitioner, while in the clerk's office, was observed making tracings of Brookfield's signature from documents in that file (R. 141–142). Thus, the foundation for this tracing aspect of the expert's testimony was amply established by proving the identity of the document from which the tracing was done, and by showing that petitioner was connected with that tracing.

This same Loving County Court clerk testified that she saw Brookfield subscribe his name "Victor Ely Brookfield" to Government Exhibit 29, a demand for jury trial (R. 139–140). Petitioner has not challenged the authenticity, as examples, of that document or of the

signature "Victor E. Brookfield" on Brookfield's 1961 income tax return (Govt. Ex. 29–C). The other two challenged standards were initials "V.E.B." on a 1963 letter to an oil company (Govt. Ex. 29–B) and the signature "Victor" on a letter received on January 21, 1964 by Brookfield's mother (Govt. Ex. 3–B; R. 139). The government's expert gave his opinion that all five examples were written by the same person (R. 189, 197, 209). It is plain that, in its ruling on the preliminary question of the admissibility of the examples, the district court did not abuse its discretion, and that those examples were an adequate foundation for the expert's opinion (R. 189, 191–195) that their author did not sign the mineral deed or the $118,000 check.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1971.

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